

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

**CHARLESTON DIVISION**

CORNELL F. DAYE,

Plaintiff,

v.

CIVIL ACTION NO. 2:09-cv-00167

JIM RUBENSTEIN, et al.,

Defendants.

**MEMORANDUM OPINION & ORDER**

Pending before the court is the defendants' Motion to Dismiss the Complaint [Docket 14] and the defendants' Supplemental Motion to Dismiss the Complaint [Docket 18]. This matter was referred to the Honorable Mary E. Stanley, United States Magistrate Judge, for submission to this court of proposed findings of fact and recommendation ("PF&R") for disposition, pursuant to 28 U.S.C. § 636(b)(1)(B). The Magistrate Judge has submitted proposed findings of fact and recommended that the court grant the defendants' Motion to Dismiss as supplemented [Docket 37].

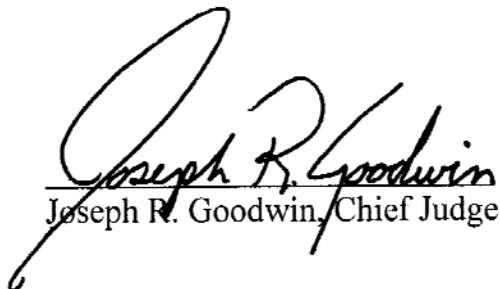
The plaintiff timely filed written objections to the Magistrate Judge's findings of fact and recommendation. Because the grievances in the plaintiff's complaint have been addressed, he states that "his complaint should be dismissed as moot as to all Defendant's [sic] except for Defendant Olivia Delung." (Pl.'s Objections PF&R 11-12 [Docket 42].) The plaintiff nevertheless objects to the Magistrate Judge's findings, and requests that his complaint continue against the defendant Ms. Delung for the purpose of recovering "costs." (*Id.*)

Having reviewed the plaintiff's objections *de novo*, the court **FINDS** that they ultimately are without merit. The court agrees with and adopts the thorough analysis of the Magistrate Judge. The fact that the plaintiff's complaint has recently become moot only strengthens this court's decision to **GRANT** the defendants' Motion to Dismiss as supplemented [Dockets 14, 18] and, as recommended by the Magistrate Judge, **DISMISS** counts one and two of the plaintiff's complaint with prejudice and count three (libel) without prejudice.

The court has additionally considered whether to grant a certificate of appealability. *See* 28 U.S.C. § 2253(c). A certificate will not be granted unless there is "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). The standard is satisfied only upon a showing that reasonable jurists would find that any assessment of the constitutional claims by this court is debatable or wrong and that any dispositive procedural ruling is likewise debatable. *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683-84 (4th Cir. 2001). The court concludes that the governing standard is not satisfied in this instance. Accordingly, the court **DENIES** a certificate of appealability.

The Clerk is **DIRECTED** to forward copies of this written opinion and order to all counsel of record and any unrepresented parties.

ENTER: January 21, 2010

  
Joseph R. Goodwin, Chief Judge